Supreme Court, U.S.
FILED
06-207 AUG 7 - 2006
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

ALFONZO INGRAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ANTHONY PINELLI*
LAW OFFICES OF ANTHONY PINELLI
53 West Jackson Blvd., Suite 1460
Chicago, Illinois 60604
(312) 583-9270

SUSAN M. PAVLOW
LAW OFFICES OF SUSAN M. PAVLOW
53 West Jackson Blvd., Suite 1460
Chicago, Illinois 60604
(312) 322-0094

STEVEN J. WEINBERG
WEINBERG & RIZZI
53 West Jackson Blvd., Suite 1460
Chicago, Illinois 60604
(312) 322-0097

**Counsel of Record for Petitioner, Alfonzo Ingram*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether payment of money to an informant conditioned upon the defendant's conviction violates due process of law?

PARTIES TO THE PROCEEDINGS

PETITIONER

The Petitioner is Alfonzo Ingram, defendant in *United States v. Alfonzo Ingram.*

In the court below, the parties were Alfonzo Ingram and Pierre Dawson. This petition is filed on behalf of Alfonso Ingram. Pierre Dawson was represented by separate counsel at trial and on appeal.

RESPONDENT

The Respondent is the United States. At trial, Respondent was represented by Assistant United States Attorney George Jackson.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
I. Paying an informant in exchange for testimony to obtain a defendant's conviction violates due process of law. The district courts have addressed the issue of contingent fees and provided a number of exceptions and rules regarding such testimony. However, none of the previous decisions have dealt with the direct tie between the criminal forfeiture, which provides the contingent fee, and the defendant's conviction. Therefore, the question is ripe for this Court to determine the propriety of the use of such evidence.	7
II. The question presented is important	13
CONCLUSION	14

INDEX TO APPENDICES

Seventh Circuit Opinion,
September 28, 2005 ..... App. 1

Seventh Circuit Order,
March 17, 2006 ..... App. 19

Seventh Circuit Opinion,
January 17, 2006 ..... App. 21

District Court Opinion Denying Motion
For Acquittal, May 26, 2004 ..... App. 27

Seventh Circuit Order,
May 9, 2006 ..... App. 31

Trial Transcript,
January 27, 2004 ..... App. 32

TABLE OF AUTHORITIES

Page

CASES

Harris v. United States, 400 F.2d 264 (5th Cir. 1968) 11

O'Sullivan v. United States Citizenship and Immigration Services, ___ F.3d ___, 2006 WL 1841768 (C.A. 7 (Ill.)) 12

United States v. Carcaise, 763 F.2d 1328 (11th Cir. 1987) 11

United States v. Cervantes Pacheco, 826 F.3d 310 (5th Cir. 1987) 7

United States v. Dawson, 425 F.3d 389 (7th Cir. 2005) 1, 5, 6, 8

United States v. Estrada, 256 F.3d 466 (7th Cir. 2001) 2, 5, 9, 10

United States v. Millan-Colon, 836 F.Supp. 994 (S.D.N.Y. 1993) 12

United States v. Palow, 777 F.2d 52 (1st Cir. 1985) 7

United States v. Rey, 811 F.2d 1453 (11th Cir. 1987) 11

United States v. Schmitz, 153 F.R.D. 136 (E.D.Wis.1994) 8

United States v. Valona, 834 F.2d 1334 (7th Cir. 1987) 7

United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984) 8

STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. V 1, 7

21 U.S.C. §853 ..... 2, 7, 12

OPINIONS BELOW

The opinion of the United States Court of Appeals affirming Ingram's conviction and ordering a limited sentencing remand is reported at 425 F.3d 389. The United States Court of Appeals opinion denying the government's petition for rehearing on the issue of cross-examination of agents regarding prior findings of incredibility is reported at 434 F.3d 956. The United States Court of Appeals order affirming the judgment was entered on March 17, 2006. The United States Court of Appeals order denying Ingram's petition for a rehearing was entered on May 9, 2006.

JURISDICTION

The Judgement of the Court of Appeals denying the Petition for Rehearing was entered on May 9, 2006. The Petition for a Writ of Certiorari therefore is due on or before August 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution guarantees basic due process rights to every defendant. The agreement at issue here violates the Fifth Amendment's guarantee of due process as provided:

> be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

The only witness to testify regarding the involvement of Alfonzo Ingram ("Ingram") in the case against him was Oscar Diaz ("Diaz"). Ingram was charged in an attempt to purchase cocaine, and with a conspiracy to make the attempted purchase. In addition, the indictment contained forfeiture allegations pursuant to 21 U.S.C. §853, to obtain $269,000 taken from Ingram's co-defendant, Pierre Dawson, at the time of both defendants' arrest. Thus, the forfeiture issues were inextricably bound to the conviction under the indictment The jury acquitted Ingram of the object of the conspiracy, the attempt to possess cocaine; but found him guilty of the conspiracy to attempt to possess drugs.

Diaz was the government's star witness at trial, providing the only evidence against Ingram by interpreting the context of otherwise largely inaudible tape recordings. At trial, defendants moved to exclude Diaz's testimony because of the contingency fee agreement citing the Seventh Circuit's reasoning in *United States v. Estrada,* 256 F.3d 466 (7th Cir. 2001) (The Seventh Circuit expressed concern about the contingent fee agreement but declined to provide the defendant any relief because of the overwhelming evidence against him). This is a case that depended entirely on Diaz with respect to the conversations and transactions at issue before the jury. A video camera placed to record the transactions failed to work. The audio tapes of the conversations contained massive inaudible portions. The void created by the absence of that evidence was filled by Diaz's description of the events.

Diaz received many incentives prior to his testimony. However, most significant to this case, Diaz was promised

20% of any money seized by the government under the forfeiture allegations of the indictment. In order to *maximize* the 20% benefit, Diaz predictably attempted to set up reverse stings, which necessarily resulted in the seizure of money instead of drugs, for which he would receive no remuneration.

Diaz was no ordinary informant. He received every benefit the government had to offer. First, Diaz was not prosecuted, despite having sold arguably thousands of kilograms of cocaine that resulted in his earning over a million dollars; and never faced the potential life sentence such quantities warranted under the relevant statutes. Aside from immunity, Diaz received a six-figure salary earning $113,000 for his government employment and never paid taxes on the money earned. At the time of trial in 2004, Diaz still had not filed his 2002 taxes. He further filed false returns in 1999, 2000, and 2001 by failing to include the large sums of money he made as a drug dealer. Moreover, Diaz claimed to have filed an extension request without paying any money for estimated taxes. Diaz was never prosecuted for tax fraud or failing to file any returns. Instead, the government stood ready to continue to pay Diaz the promised 20% without any concern for his fraudulent tax activities.

Most notably, Diaz received United States citizenship. He lied on his citizenship application regarding his criminal activities. DEA agents became aware of his lie, yet did nothing to alert INS or require Diaz to amend his application, essentially assuring his citizenship.

In addition to being immune from the INS and the IRS, Diaz was not prosecuted for crimes committed *after* he entered into his informant agreement. Diaz fabricated

evidence to the DEA, the United States Attorney's Office, and the Cicero, Illinois, Police Department. Diaz admitted going home with two women involved in a tangential investigation with the hopes of having sex with both of them. Diaz let them tie him up. When police arrived at the apartment, however, Diaz told authorities that the two women kidnapped him, tied him up, and threatened him with a gun if he continued to cooperate in the other investigation. Diaz later admitted his lie after the two women had been indicted, but suffered no prosecution for obstructing justice or breach of his informant agreement.

The evidence against Ingram was hardly overwhelming. Diaz and Pierre Dawson ("Dawson"), Ingram's co-defendant at trial, participated in months of tape recorded telephone calls and meetings. In the multiple debriefings of Diaz, he never once mentioned Ingram. On July 12, 2002, the day of Ingram's arrest, two tape recorded conversations occurred with Diaz. The first conversation occurred in a Walgreen's parking lot where Dawson and Diaz negotiated the deal outside Ingram's presence. When Ingram walked up and joined the conversation, Diaz claimed to have recognized Ingram from a previous occasion. The other recorded conversation took place in Diaz's garage after Dawson entered with $269,000 in cash, accompanied by Ingram, just prior to the entry of agents who then arrested both Ingram and Dawson. Most of the recordings were unintelligible and were marked as such in the transcripts. Diaz himself admitted that he lacked any independent recollection of the substance of the conversations. However, it was Diaz's interpretation of the inaudible portions, and the context he placed on other innocuous conversations, that formed the basis of Ingram's conviction for the conspiracy count.

In short, to believe that Ingram was participating in a drug conversation, the jury had to believe Diaz. The jury convicted Ingram on the conspiracy count. However, despite Diaz's testimony of what occurred in the garage prior to Ingram's arrest, the jury acquitted him of Count Two, the attempt to possess cocaine, the object of the conspiracy.

In affirming Ingram's conviction for drug conspiracy, a Majority of the Seventh Circuit three-judge panel ("Majority") qualified Diaz's 20% as a bounty, an acceptable form of "incentive compatible" payment, as long as the jury was presented with the information. The Majority concluded that even if it were a contingency, such an arrangement was permissible since to exclude Diaz's testimony on this basis would result in a windfall for defendants. Further, the Majority ignored *Estrada,* despite the fact that Ingram's case was directly on point with the facts of *Estrada* and was distinguishable only in that the evidence against Ingram was far from overwhelming.

In contrast, Judge Williams dissented, finding that upholding a defendant's right to due process would hardly be a windfall:

> What is important is the structure of the agreement in that the government has brokered here with its witness, and that structure ultimately leaves the government witness financially motivated in the conviction of the defendants. *Dawson,* 425 F.3d at 397.
>
> * * *
>
> Thus, not only was Diaz able to give his financial motivation in the defendants' conviction a rough

> dollar figure, but he also, by providing testimonial evidence as to the amount of currency the government seized from Dawson and Ingram, helped make the government's case for forfeiture itself. *Id.*
>
> * * *
>
> I do not discount the value inherent in avoiding windfalls, but to appreciate that value is not to say that other values do not here exist. These values too are important. *Id.* at 398.

As Judge Williams noted, the question is one of balancing values. Obviously, in the war on drugs, the testimony of informants is critical ammunition for the government. However, our system depends upon due process to restrain the abuse of any evidence which plants the seeds of perjury from which an unlawful conviction could grow. This case presents the Court the opportunity to clarify the use of such agreements.

REASONS FOR GRANTING THE WRIT

I.

Paying an informant in exchange for testimony to obtain a defendant's conviction violates due process of law. The district courts have addressed the issue of contingent fees and provided a number of exceptions and rules regarding such testimony. However, none of the previous decisions have dealt with the direct tie between the criminal forfeiture, which provides the contingent fee, and the defendant's conviction. Therefore, the question is ripe for this Court to determine the propriety of the use of such evidence.

"The truth has no marketplace." *United States v. Cervantes-Pacheco,* 826 F.3d 310, 316 (5th Cir. 1987) (Goldberg, J.) (dissenting). In the opinion below, the Seventh Circuit attempted to establish such a marketplace by asserting that judges are "in no position to evaluate the government's need to offer monetary or other inducements" to criminals. However, courts are in a position to prohibit payments to informants contingent upon an individual's conviction, as such payments violate a defendant's due process rights. U.S. Const. amend. V; *United States v. Palow,* 777 F.2d 52, 54 (1st Cir. 1985); *see United States v. Valona,* 834 F.2d 1334, 1344 (7th Cir. 1987) (Informant's receipt of 10% of the value of any contraband recovered was received before trial and not contingent upon the trial outcome).

Payments dependent on the success of a criminal forfeiture are premised on a defendant's conviction as "[a] forfeiture under §853 only occurs upon conviction." 21

U.S.C. §853; *United States v. Schmitz,* 153 F.R.D. 136 (E.D.Wis.1994) (Goodstein, J.). Here, there can be no question that Ingram's conviction got Diaz paid. *Dawson,* 425 F.3d at 398. The government included a forfeiture allegation in the indictment, pursuant to 21 U.S.C. §853, for the $269,000 seized at the time of Ingram's arrest. Because Diaz stood to receive his 20% of the $269,000 sought to be forfeited under the indictment, he was motivated to ensure Ingram's conviction.

In the court below, the Majority opinion ("Majority") of the Seventh Circuit determined that the judiciary was in no position to tell the government how to handle, or pay, their informants by declining to say whether 5% is too little, or 20% too great, despite recognizing that "bounties that are too generous might actually induce people to become drug dealers, in the thought that if the business becomes too hot they can always enlist as bounty hunters for the DEA," *Dawson,* 425 F.3d at 395. The Majority's analysis is flawed in two respects. First, it failed to recognize the difference between bestowing benefits on informants for their information and offering a commission dependent on the conviction of the defendant. It is the latter that "creates a risk of perjury so great that even the jury's full knowledge of the agreement is insufficient to protect the fundamental fairness inherent in the due process clause." *United States v. Waterman,* 732 F.2d 1527, 1530 (8th Cir. 1984). And second, the courts are the gatekeepers of reliable and admissible evidence at a trial in order to ensure the defendant's due process rights. It is not for the jury to understand and uphold a defendant's due process rights. That is the responsibility of the courts.

Diaz's 20% was to come from a criminal forfeiture dependent on the conviction of Ingram. Rather than

address the issue, the Majority recast the 20% commission as a bounty. This analysis fails. A bounty hunter gets paid when he has returned the prisoner to the sheriff. In return for the prisoner, the bounty hunter gets paid, thus ending his role. It becomes irrelevant whether the prisoner is ultimately found guilty or acquitted. In contrast, when Diaz turned over Ingram to the authorities, he had not yet earned any of the 20%. His 20% pay was clearly contingent on the forfeiture count in the indictment seeking $269,000, which depended on the government's success at trial. The government brokered a deal in exchange for evidence and testimony which ultimately would make no payment absent a conviction. The witness was financially motivated well beyond the numerous rewards previously provided to him. Moreover, the Majority's characterization of the exclusion of such evidence as a windfall completely ignores a defendant's right to a fair trial and due process under the law. Only the courts can prevent the type of abuse which is described by the facts in this case, the exclusion of evidence on the basis of any constitutional violation. It remains within the court's authority to enforce the law and keep the government within the boundaries of the law. When the court acts in that fashion, it is not providing a windfall, it is fulfilling its duty as a guardian to the constitution.

The Seventh Circuit identified and warily circled this issue in an earlier opinion, *United States v. Estrada,* 256 F.3d 466 (7th Cir. 2001), in which it warned the government about use of such agreements. In *Estrada,* the informant began working for the government after his arrest, thus avoiding a life sentence for the 300-400 kilograms of cocaine he sold. As an informant, he instigated reverse sting operations in return for receiving 25%

of whatever money the DEA seized and forfeited during a sting. *Id.* at 469. He received over $400,000 from the government and in Estrada's case, stood to gain 25% of the $60,000 seized at Estrada's arrest. *Id.* at 468. While noting that the general position regarding informant arrangements is to make it a credibility determination for the jury, the Court took pause with the fact that the informant was not being paid a stipend prior to trial, as well as with the informant's lack of clarity about the payment arrangements. *Id.* at 471. Instead, the Seventh Circuit found that the jury instruction "underscores what promotes unease about the arrangement in this case, which is that Varela's fee arrangement was dependent, in part, on the conviction of Estrada." *Id.* at 471. Noting the government's arrangement as "a problematic means of pursuing a drug case" because the informant was motivated to convict Estrada to receive the 25% commission, the Court stated that "such an incentive structure does little to enhance overall confidence in the criminal justice system." *Id.* at 472. However, because of the overwhelming evidence against Estrada, aside from the informant's testimony, the Seventh Circuit declined to grant Estrada any relief, thus leaving the question for another day.

Unlike *Estrada,* the evidence against Ingram was hardly overwhelming. Ingram's defense was mere presence, and the jury acquitted him on Count Two, the attempt to purchase drugs, despite Diaz's testimony of what occurred in the garage and his interpretation of what was on the recordings. While the jury convicted Ingram of participating in a drug conspiracy, he was acquitted of the object of the same conspiracy.

When confronted with *Estrada,* the district court in this case expressed concern and sought guidance as to how

best to deal with the agreement brokered by the government, stating:

> But I do have to say I think the government has taken quite a risk I mean, one of these days, a panel up there is likely, it seems to me it might well say: Wait a minute. We warned you. Obviously you're still doing this and doing this, and we are going to – if the only way to get you to stop doing it is to throw one out, that they are going to throw one out.
>
> It looks like it's fairly easily avoided. I mean, what they are really criticizing so much that it – well, I guess that is the nature of a contingent fee, that somebody isn't paid before testifying. App. 33-34.

It is apparent that the lower courts have grappled with this issue but have been unable to fashion a rule which would prevent the government's purchase of testimony conditioned upon conviction. Instead, courts have relied upon the jury's ability to sift through the evidence and find the truth based on standard credibility instructions. *See Harris v. United States,* 400 F.2d 264 (5th Cir. 1968) (Prior knowledge the defendant was committing the offense may justify a contingent fee agreement); *United States v. Rey,* 811 F.2d 1453, 1457 (11th Cir. 1987) ("Potential problem of a contingently-motivated informer" not present when called by the defense, and not the government); *United States v. Carcaise,* 763 F.2d 1328 (11th Cir. 1985) (reduced sentence and expenses are not contingent agreements). However, none of these earlier cases, nor the language of the instructions, address money given to an informant who testifies as an eyewitness and does more than bring the transaction to the government's attention,

but actually completes the deal and provides the only evidence at trial.

At no stage of this litigation has the government explained why it was necessary to entice Diaz with a contingent fee in light of the plethora of other benefits the government can, and did, offer here. Arguably, Diaz's most prized benefit was his citizenship despite his false application. *See O'Sullivan v. United States Citizenship and Immigration Services*, ___ F.3d ___, 2006 WL 1841768 (C.A. 7 (Ill.)) (an honorably discharged war veteran of both the Marines and the Air Force was ordered deported as he was deemed not to possess good moral character where he was convicted for being a party to the crime of manufacture or delivery of *less* than 5 grams of cocaine). The government can, and did, offer immunity from drug offenses, tax offenses, and obstruction of justice charges, base salary and relocation expenses, and second chances when informant agreements were breached. These benefits are properly put before a jury to judge the informant's credibility.

The government has the option of instituting civil forfeiture proceedings in a case that is wholly separate from the criminal proceeding. Here, the government did not exercise that option. Instead, it chose a criminal forfeiture proceeding pursuant to 21 U.S.C. §853. The success of a criminal forfeiture is dependent on a conviction. Unlike civil forfeiture, "section 853 provides that restrained assets will be forfeited in the event of a conviction." *United States v. Millan-Colon,* 836 F.Supp. 994, 1002 (S.D.N.Y. 1993) (Kramm, J.).

A bar of any success-based fee is the only appropriate remedy. The government is permitted to offer reduced

sentences, immunity, sentencing recommendations, and money. The government can even, as they did here, give citizenship to criminals. However, all these things were given *prior* to trial. For Diaz to receive his 20%, the money must be criminally forfeited. A prerequisite to criminal forfeiture is a conviction. Thus, Diaz's receipt of his fee was contingent on the conviction of Ingram and violated his right to a due process and a fair trial. No justification exists for allowing the government to sow the potential seeds of perjury which will grow from the motivation provided to the informant to shade, correct, or exaggerate his testimony in direct exchange for money.

II.

The question presented is important

Current authority discussing and reviewing the use of these types of fee agreements have failed to address a case in which the outcome of the trial is directly affected by the informant's motivation to receive money contingent on the verdict. This Court can draw a line between payment to an informant, which will not hinder the prosecution of cases, as opposed to payment for conviction. Historically, due process violations have not been resolved on the basis of a jury's credibility determinations. The harm done to a defendant's due process rights cannot be repaired by standard jury instructions and the failure of the Majority opinion in this case to squarely address this practice serves only to highlight the void in the current law. In short, how much is too much? This case reflects every conceivable benefit that the government can give to an informant. However, when contingent fees are premised on criminal forfeitures, thus requiring a conviction, due

process is violated as the informant's fee becomes outcome dependent.

Petitioner respectfully submits that this is an important issue requiring a determination by this Court. If a change in the law is required it can only be made by this Court analyzing the due process issues raised in this case.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY PINELLI
Counsel of Record
Attorney for Petitioner
53 West Jackson Boulevard
Suite 1460
Chicago, Illinois 60604-1797
312-583-9270

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Pierre DAWSON and Alphonso Ingram,
Defendants-Appellants.
Nos. 04-2557, 04-2592.
Argued June 3, 2005.
Decided Sept. 28, 2005.

George W. Jackson, III (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Joseph A. Morris (argued), Morris, Rathnau & Delarosa, Thomas A. Durkin (argued), Durkin & Roberts, Chicago, IL, for Defendant-Appellant.

Before CUDAHY, POSNER, and WILLIAMS, Circuit Judges.

POSNER, Circuit Judge.

The defendants were convicted by a jury of federal drug offenses and sentenced to 300 months in prison (Ingram) and 360 months (Dawson). Among the grounds for reversal that they press on us with misplaced zeal in more than 130 pages of briefs is that in every trial of a federal drug offender the prosecution must prove that the defendant's offense had an actual impact on interstate or foreign commerce. Otherwise, they argue, the prosecution may exceed the regulatory power conferred on Congress by the commerce clause of the Constitution. The statutes under which the defendants were prosecuted, 21 U.S.C. §§ 841, 846, do not, it is true, make effect on commerce an element of the crime, and so no proof of such an effect was presented at the trial. But it is common knowledge that the traffic in most illegal drugs – certainly including

cocaine, the drug involved in this case, very little of which is manufactured in the United States because no coca is grown here – is national or (in the case of cocaine) international rather than local. Of course there are local *sales* of the drugs, at the end of the commerce chain; but these, taken in the aggregate, certainly affect the interstate and international traffic in these drugs, and that is the only handle that Congress requires to be empowered by the commerce clause to legislate with respect to the local sales. *Gonzales v. Raich*, ___ U.S. ___, ___-___, 125 S.Ct. 2195, 2205-06, 162 L.Ed.2d 1 (2005). The *Lopez* decision, on which the defendants principally rely, reaffirmed *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), which had held that wheat grown by a farmer for his own consumption was within the commerce power because the wheat is traded in a national market and home consumption affects the amount available for that trade. *United States v. Lopez*, 514 U.S. 549, 559-60, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). Similarly, local sales of drugs affect the demand for their importation. *United States v. Thomas*, 159 F.3d 296, 297-98 (7th Cir.1998).

The government's principal evidence of the defendants' guilt consisted of testimony and recordings by Oscar Diaz, who after years as a major drug dealer following his illegal entry into the United States had agreed to cooperate with the DEA in exchange for a fee of 20 percent of any proceeds of drug sales that the government recovered as a result of Diaz's efforts; he received additional compensation in an unknown amount. The DEA also, though apparently not pursuant to an explicit agreement with Diaz, forbore to inform the INS that he had, as the DEA knew, lied on his application for U.S. citizenship when he said he hadn't committed any crimes. (By the time of trial, Diaz

was a U.S. citizen.) He was also assured that as long as he continued cooperating and told the truth, he would not be prosecuted for his past drug dealing. Before and after becoming a government informant, Diaz sold cocaine to the defendants.

Diaz recorded (or transmitted to government agents who recorded) a number of his conversations, both telephonic and in person, with the two defendants. He later reviewed the tapes and testified at trial that they accurately recorded the conversations, although not completely; some words were unintelligible and Diaz did not have an independent recollection of what they were. There were also gaps in the tapes – sometimes the signal from the transmitter was interrupted, and sometimes Diaz had failed to start his recorder at the beginning of the conversation or had ended it before the conversation ended. There may also have been erasures, though these may have been of conversations that did not involve the defendants. No "chain of custody" was established; that is, the government could not account for every person who had had access to the recordings between when they were made and the trial.

Because of these irregularities, the defendants argue that the tapes were not "authenticated" and should therefore have been excluded from evidence. Fed.R.Evid. 901. Evidence that is not oral testimony must be shown to be what it purports to be rather than a forgery or other fabrication or an innocent misidentification. But there are no rigid rules, such as chain of custody, for authentication; all that is required is adequate evidence of genuineness. *United States v. Brown,* 136 F.3d 1176, 1181 (7th Cir.1998); *United States v. Tropeano,* 252 F.3d 653, 661 (2d Cir.2001). (There are such rules for electronic surveillance governed

by Title III, but Title III is inapplicable to conversations that, as here, are recorded with the consent of one of the participants. 18 U.S.C. § 2511(2)(c); *United States v. Eschweiler,* 745 F.2d 435, 437 (7th Cir.1984); *Meredith v. Gavin,* 446 F.2d 794, 798 (8th Cir.1971).) The defendants do not deny that it is their voices on the tapes. Nor is there any indication of splicing or other alterations that might have changed the meaning of what they had actually said. The only complaint is that the gaps or erasures might contain exculpatory material, although there is no evidence that they do. Even if they did, this would not "de-authenticate," and hence make inadmissible, the tapes of the conversations that were recorded. *United States v. Robinson,* 956 F.2d 1388, 1395 (7th Cir.1992); *United States v. Vega,* 860 F.2d 779, 790-91 (7th Cir.1988); *United States v. Calderin-Rodriguez,* 244 F.3d 977, 987 (8th Cir.2001). And it would not raise a *Brady* issue even if (though there is no indication of this) the government was aware of what was said in the conversations but not recorded, because the defendants, being parties to the conversation, were equally aware. *Brady* requires disclosure only of exculpatory material known to the government but not to the defendant. E.g., *Gauger v. Hendle,* 349 F.3d 354, 360 (7th Cir.2003); *Buie v. McAdory,* 341 F.3d 623, 625-26 (7th Cir.2003); *Fullwood v. Lee,* 290 F.3d 663, 685-86 (4th Cir.2002).

The defendants argue that Diaz should not have been allowed to testify at all (in which event he could not have authenticated the tapes, and so the government's case would have collapsed) because of the benefits he received in exchange for his assistance to the prosecution, in particular the 20 percent bounty that he received. The defendants imprecisely describe this as a contingent fee

for his testimony. A bounty and a witness fee are different. A bounty is a reward for rendering a service that the offeror wants done, whether it's shooting wolves that prey on sheep or catching criminals who prey on humans. E.g., 19 U.S.C. § 1619; *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 665 (7th Cir.2001); *United States v. Jennings*, 160 F.3d 1006, 1015 n. 3 (4th Cir.1998); *Doe v. United States*, 100 F.3d 1576, 1581-82 (Fed.Cir.1996); cf. *United States v. Cervantes-Pacheco*, 826 F.2d 310, 311-12 (5th Cir.1987) (en banc). Here the bounty was for helping the authorities nail drug offenders. Although rather than being a flat fee it was a percentage of the money that the government recovered from the offenders, *United States v. Estrada*, 256 F.3d 466, 468 (7th Cir.2001), this form of compensation is what economists call "incentive compatible" ("motivational" would be an alternative term for it): it gives the bounty hunter an incentive to concentrate on the biggest prey.

The bounty was not a contingent fee for testimony because it was paid whether or not Diaz testified. Since most cases, including forfeiture cases (and the forfeiture components of criminal cases), are settled rather than tried, probably Diaz usually earned the bounty without having to testify. Of course when he did testify, as in this case, his bounty may have been riding on the outcome (though this is unclear), giving him a monetary incentive to testify favorably to the government. From the standpoint of incentive to lie, a bounty based on an adjudicative outcome is much more suspect than one obtained simply by procuring a seizure of forfeitable goods. And the defendants are right to point out that paying witnesses (other than experts) for their testimony (beyond the tiny fees permitted, in the case of federal trials, by the Judicial

Code, 28 U.S.C. § 1821) is forbidden. 18 U.S.C. § 201(c)(2). Even an expert witness, and *a fortiori* an occurrence witness, may not be paid more if the party for whom he is testifying wins the case. *Tagatz v. Marquette University,* 861 F.2d 1040, 1042 (7th Cir.1988); *United States v. Cervantes-Pacheco, supra,* 826 F.2d at 313; *United States v. Gray,* 626 F.2d 494, 499 (5th Cir.1980); *United States v. Palow,* 777 F.2d 52, 54 (1st Cir.1985).

Yet whether violation even of that rule requires exclusion of the testimony from being used against a defendant is a separate question. *Tagatz v. Marquette University, supra,* 861 F.2d at 1042; *United States v. Valona,* 834 F.2d 1334, 1343-44 (7th Cir.1987); *United States v. Cervantes-Pacheco, supra,* 826 F.2d at 316 (concurring opinion). Exclusion confers windfalls on the guilty and therefore, at least as a device for enforcing nonconstitutional rules, is disfavored. *United States v. Caceres,* 440 U.S. 741, 755-56, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979) ("a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures"); *Buntrock v. SEC,* 347 F.3d 995, 999 (7th Cir.2003); *United States v. Newell,* 239 F.3d 917, 921 (7th Cir.2001) ("exclusionary rules are disfavored as remedies for nonconstitutional violations of law"); *United States v. Gilbert,* 942 F.2d 1537, 1541-42 (11th Cir.1991). An exclusionary rule would be not only costly but also gratuitous in the present setting, because a jury should be competent to discount appropriately testimony given under a powerful inducement to lie. An exclusionary rule for that class of evidence was rejected in *United States v. Condon,* 170 F.3d 687, 688-89 (7th Cir.1999), and cases cited in that opinion. It should not be resurrected,

whether in the form of the discredited "outrageous government conduct" doctrine here futilely pressed on us by the defendants, *United States v. Sherman,* 268 F.3d 539, 550 (7th Cir.2001); *United States v. Boyd,* 55 F.3d 239, 241-42 (7th Cir.1995); *United States v. Nolan-Cooper,* 155 F.3d 221, 229-30 (3d Cir.1998), or by raising the bar of Rule 403 and presuming that evidence given under strong inducements – such as the bounty at issue here, not to mention permitting Diaz to become a citizen and escape criminal punishment for the drug dealing that he engaged in before he agreed to become a government informant – is so unreliable that its probative value is clearly outweighed by a tendency to confuse the jury.

Any *general* policy (whether enforced by exclusion or by some other means) against giving a witness inducements to testify, rather than relying entirely on his love of truth or the terrors of the oath, would require reinstating the old rule (illustrated by the trial of the eponymous hero of *The Pickwick Papers* for breach of promise) that the party to a case may not testify at all because he has an interest, pecuniary or otherwise, in the outcome and is therefore not a disinterested witness. Williams S. Holdsworth, *Charles Dickens as a Legal Historian* 132-35 (1928). Most of the key witnesses in cases of drug dealing and other "victimless" crimes (that is, crimes consisting of voluntary transactions, so that there is no *complaining* victim) are criminals testifying in the hope of obtaining leniency or other benefits from the government. Such testimony is frequently indispensable, and it is not worthless; Diaz's testimony, for example, was amply corroborated, and not only by the recordings.

Judges are in no position to evaluate the government's need to offer monetary or other inducements to the criminals whom it hopes to enlist in the "war against drugs." Should we tell the Justice Department that 20 percent was too generous a bounty to pay Diaz? That 5 percent would have been sufficient? That bounties that are too generous might actually induce people to *become* drug dealers, in the thought that if the business becomes too hot they can always enlist as bounty hunters for the DEA? Our job, so far as it bears on whether Diaz should have been excluded from testifying at all, is to make sure that grossly unreliable evidence is not used to convict a defendant. We do this by requiring (in effect) that the inducements be disclosed to the jury, which can use its common sense to screen out evidence that it finds to be wholly unreliable because of the inducements that the witness received. *Wisehart v. Davis,* 408 F.3d 321, 323-24 (7th Cir.2005). The more extravagant the blandishments, the more likely the jury is to discredit the witnesses who received them.

Another issue presented by the appeals concerns the judge's response to a note that she received from the jury during its deliberations. The note asked whether "given the wording [in the indictment] 'Pierre Dawson and Alfonso Ingram did conspire with each other . . . ,' can one defendant be separate from the other? It's difficult to establish a separate verdict given the wording." The judge responded: "In answer to your question, a conspiracy involves an agreement between a defendant and one or more other persons to accomplish an illegal purpose. Therefore, it is possible to make an individual determination as to each defendant." The defendants argue that the judge should have said "*must* make an individual determination" rather than "*it is possible* to make an individual

determination," since her wording may have been understood to mean that the jury didn't *have* to consider the guilt or innocence of each defendant separately.

But it is better for a trial judge to answer the question that the jury asks than another question, unless answering just the jury's question would entrench some misunderstanding revealed by their question. The jury asked "can one defendant be separate from the other" and the judge answered, "yes, one defendant can ['it is possible'] be separated from the other." Had the judge answered "not only can, but must," this might have set the jurors to scratching their heads, wondering what they had missed.

In her original instructions the judge had told the jury that "even though the defendants are being tried together, you must give each of them separate consideration. . . . You must separate consideration both to each count and to each defendant." The jury was not questioning *that* instruction. It was asking whether it was possible, given that the defendants were accused of conspiring with each other, to convict (or acquit) one defendant but not the other. It *was* possible, as the judge instructed, but only if there were additional conspirators.

If the only conspirators were Dawson and Ingram (Diaz, who was working undercover for the government when the transactions for which the defendants were prosecuted were made, could not count as a conspirator, *United States v. Duff*, 76 F.3d 122, 127 (7th Cir.1996)), then either both were guilty of conspiracy or neither. In that case, to tell the jury that they "must" separate the defendants might well have misled them, in part by giving undue emphasis to the "separate consideration" instruction. There was, however, evidence of other, though uncharged,

conspirators with Dawson and Ingram in their very large drug business. And so the jury, if for example it thought the evidence of Ingram's participation in the conspiracy weak (the evidence of Dawson's participation was very strong), could "separate" the defendants and find only Dawson guilty of conspiracy. The supplemental instruction permitted, but rightly did not compel, such separation, since, to repeat, if the jury found that Dawson and Ingram were the sole conspirators, their verdict on the conspiracy count would have to be the same for both of them. It would, however, have been better had the instruction told the jury explicitly that the conspiracy could have involved other persons besides just the defendants and the informant.

In suppression hearings in two previous cases, involving other defendants, the trial judges had disbelieved testimony by three government agents who also testified for the prosecution in our case. Defense counsel in our case wanted to use those judges' rulings to impeach the three witnesses' testimony. The judge refused on the basis of Rule 608(b) of the Federal Rules of Evidence, which provides that "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence." Our defendants were not proposing to use extrinsic evidence, however, but merely to ask each witness whether a judge had disbelieved him or her in a previous case. But the error was harmless. In plea bargains that resolved the previous cases, the defendants had acknowledged that the witnesses whom the judges had disbelieved had been telling the truth. The prosecutor would have trotted out the plea bargains on redirect

examination in our case, thereby neutering the cross-examination.

Ingram complains that he should not have been denied a sentencing discount for having been a minor participant in the conspiracy. U.S.S.G. § 3B1.2(b). The government argues that though Diaz's dealings were mainly with Dawson there was evidence that Ingram was actually the kingpin. The government points out that the higher you are in an illegal business, the less likely you are to be present at individual transactions, since that would increase your chance of being arrested. Leaders rationally as well as selfishly seek to insulate themselves from the risks to which their underlings are exposed, because a leader is a scarcer commodity than a follower. Steven D. Levitt & Sudhir Alladi Venkatesh, "An Economic Analysis of a Drug Selling Gang's Finances," 115 *Q.J. Econ.* 755, 761-62 (2000). The larger the transaction, however, the likelier the leader is to be present. At a sale of 38 kilograms of cocaine, Ingram carried the $269,000 in cash for the purchase price from Memphis, the headquarters of the gang, and assured Diaz that the deal would go through and that Diaz would get all the money. That was the talk not of a courier but of a manager, Dawson's equal or superior. And another witness testified that it was Ingram who always took possession of the drugs that the gang held at its Memphis headquarters.

So we find no error, but since the sentencing determinations were made under the pre-*Booker* regime, we have to order the limited *Paladino* remand. *United States v. Paladino,* 401 F.3d 471, 483-84 (7th Cir.2005).

WILLIAMS, Circuit Judge, dissenting.

Whether it be termed a "contingent fee" or "bounty" – an expression even less palatable and more indicative of this practice – is a matter of semantics and here unimportant. What is important is the structure of the agreement that the government has brokered here with its witness, and that structure ultimately leaves the government witness financially motivated in the conviction of the defendants.

Here, as a part of his agreement with the government to serve as an informant, Diaz was to receive up to 20% of any money seized and forfeited as a result of his cooperation. Pursuant to the deal, if (and only if) a conviction or plea was secured, and the seized money forfeited, the informant would get a piece of the forfeiture. The majority says the threat of harm this arrangement poses is minimized because Diaz got paid regardless of whether or not he testified, and that most cases get settled rather than tried. But the case at bar is not most cases. This case was tried, and Diaz's testimony was an integral part of it. Indeed, as the majority notes, "the government's case would have collapsed" without it. At bottom, the operative facts of this case are clear: Diaz would get proceeds from the Dawson and Ingram bust only if the defendants were convicted, and he testified for the government in the trial designed to secure that conviction. Put differently, Diaz was paid only if the party for whom he was testifying won the case.

There is little doubt that Diaz's bounty was "riding on the outcome" of the Dawson and Ingram prosecution. Diaz testified to the arrangement on direct examination by the government, admitting that he "could get up to 20

percent."[1] Even the government concedes that "Diaz stood to receive up to 20% of any money seized and forfeited resulting from Diaz's cooperation." Appellee Br. at 33. What's more, Diaz knew almost exactly how much was seized from the defendants at the time he testified. We know this because he offered testimony as to the exact dollar figure seized from Dawson and Ingram at the bust – $269,000.[2] Thus, not only was Diaz able to give his financial motivation in the defendants' conviction a rough dollar figure, but he also, by providing testimonial evidence as to the amount of currency the government seized from Dawson and Ingram, helped make the government's case for forfeiture itself.

Nor is it unclear whether the government pursued the forfeiture of those seized assets. The government sought those assets from the outset, as page three of the November 19, 2002, indictment against the two defendants clearly sets forth forfeiture allegations, naming "$280,000 in United States currency" subject to forfeiture pursuant

---

[1] Trial Transcript at 180-81:

Q: [W]hat's your understanding as to whether you will receive additional money for your cooperation in this case?

Diaz: They didn't tell me nothing. They just told me that if it was any moneys, I could get up to 20 percent.

Q: Any money seized, that you can get up to 20 percent of the money that's seized, is that your understanding?

Diaz: Yes.

[2] Trial transcript at 181:

Q: How much money was seized in the first case?

Diaz: 269,000

Q: Is that *this* case that you are talking about, the money for which you are testifying now?

Diaz: Yes.

to Title 21, United States Code, Section 853. That $280,000 figure included "more specifically funds in the amounts of $4239.00, $4273.00 and $269,005.00," as page one of the June 16, 2004 Motion of the United States for Entry of Preliminary Order of Forfeiture – filed on the heels of the defendants' February 4, 2004 conviction – reveals. Nor is there any doubt that those assets were in fact ultimately forfeited, as the district court entered preliminary orders toward that end against both Dawson (Minute Order, August 25, 2004) and Ingram (Minute Order, June 6, 2004). While it may be unclear whether Diaz takes his 20% proceeds in cash or cashier's check, we may say with sufficient certainty that the conviction of Dawson and Ingram will get Diaz paid.

As the majority acknowledges, there is a rule against paying witnesses an additional fee, if the party for whom they testify wins the case. See Maj. Op. at 394. The majority, however, would limit this rule to one of professional conduct rather than extend it to admissibility of evidence, *see Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1042 (7th Cir.1988), predicting the threat of the "windfalls" that would surely come on the heels of an exclusionary rule. I do not discount the value inherent in avoiding windfalls, but to appreciate that value is not to say that other values do not here exist. Indeed, they do, and they are nothing less than due process and fairness to defendants.

These values too are important. In *United States v. Estrada,* 256 F.3d 466 (7th Cir.2001), we expressed reservations about a fee arrangement with a witness that, like here, was dependent on the defendant's conviction. "Such an incentive structure," we said, "does little to enhance overall confidence in the criminal justice system." *Id.* at 472. Only because there was "overwhelming evidence" of

the defendant's drug involvement did we conclude that the defendant's sentence did "not carry with it the specter of a miscarriage of justice." *Id.* Here, though, as the majority recognizes, the government's case could not have survived without Diaz's testimony.

Other circuits have also expressed reservations about this practice although, unfortunately, often in opinions that have long since been ignored if not abrogated or outright overruled. *See, e.g., United States v. Waterman,* 732 F.2d 1527, 1528 (8th Cir.1984) (holding that a witness agreement contingent upon the outcome of the case "hampered the truth-finding function of the jury to a degree which cannot be reconciled with the fair procedures guaranteed by the due process clause of the fifth amendment"), *vacated en banc, id.* at 1533; *Williamson v. United States,* 311 F.2d 441, 444 (5th Cir.1962) (rejecting testimony elicited through an outcome-dependent agreement in keeping with "the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes"), *overruled by United States v. Cervantes-Pacheco,* 826 F.2d 310, 316 (5th Cir.1987).

Yet the specter of these values persists nonetheless. As our sister circuit noted in *United States v. Dailey,* 759 F.2d 192, 201 n. 9 (1st Cir.1985), "benefits made contingent upon subsequent indictments or convictions skate very close to, if indeed they do not cross, the limits imposed by the due process clause." As the *Dailey* court stated, it could "think of no instance in which the government would be justified in making a promised benefit contingent upon the return of an indictment or a guilty verdict." *Id.* at 201. And I certainly acknowledge that this circuit has expressly rejected the doctrine of "outrageous government conduct"

first posited by the Court in *United States v. Russell,* 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).[3] *See United States v. Boyd,* 55 F.3d 239, 241 (7th Cir.1995) (holding that "the doctrine [of outrageous government conduct] does not exist in this circuit"). However, should the government continue to utilize these agreements, I am confident that another opportunity to revisit that doctrine will not be long off.

I should be comforted, according to my colleagues, by the merits of vigorous cross-examination and jury competency in ferreting out "testimony given under a powerful inducement to lie." I find greater comfort, however, in the text of the since vacated *Waterman* decision. That panel rejected such reliance on the jury's role in making credibility determinations: "[W]e see no place in due process law for positioning the jury to weed out the seeds of untruth planted by the government. Certainly [the witness] might have lied regardless of the contingency agreement and the jury was generally commissioned to determine the truth of his testimony; but that is no reason for the government to give him further incentive to selectively remember past events in a manner favorable to the indictment or conviction of others." *Waterman,* 732 F.2d at 1532. Indeed, the impact on "the truth-finding function of the jury" is what led the panel to find such arrangements in contravention of due process in the first place. *Id.* at 1528.

While the precedent both within and without this circuit suggests that I might swim against the tide, there

---

[3] In *Russell,* the Supreme Court suggested that there may be "a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.*

are nonetheless sub-currents of which the government should take note before again brokering these bargains. *See, e.g., Estrada,* 256 F.3d at 472; *United States v. Innamorati,* 996 F.2d 456, 482 (1st Cir.1993) (upholding admissibility of testimony where payment to the witness "was completed several days prior to trial, and the payment was thus not directly dependent upon the result of [the witness's] testimony in court"); *Dailey,* 759 F.2d at 201. The government might also consider the canons of professional conduct, which forbid the practice of predicating witness payment on case outcomes. *See* Maj. Op. ("Even an expert witness, and *a fortiori* an occurrence witness, may not be paid more if the party for whom he is testifying wins the case."); *Cervantes-Pacheco,* 826 F.2d at 316 (Rubin, J., concurring) (noting that "employment of a witness for a fee contingent upon victory for the party in whose favor he testifies is a violation of both the Model Rules of Professional Conduct [Rule 3.4] and the Code of Professional Responsibility [DR 7-109]"); Model Code of Professional Responsibility DR 7-109(C) (1980) ("A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.").

I recognize that witnesses can receive immunity or reduced sentences in exchange for their truthful testimony, *see, e.g., United States v. Blassingame,* 197 F.3d 271, 285 (7th Cir.1999), and I have no quarrel with that practice. It is one thing to accept the myriad and sometimes sordid realities that motivate witnesses to testify; but it is another affirmatively to invite inherently tainted testimony. The danger of these outcome-contingent agreements is real; "[t]he opportunities for abuse . . . too obvious to require elaboration." *Williamson,* 311 F.2d at 444. Nor is

this a matter of quibbling over the exact percentage that the government may pay to secure supporting testimony, for that, as my colleagues rightly note, is not within the province of the judicial department. What is a matter of judicial concern, however, is a defendant's right to a fair trial, and it is that concern that renders any percentage of moneys paid to a witness improper when such payment depends upon the conviction of another.

For these reasons, I respectfully dissent.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

March 17, 2006

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

Nos. 04-2557 and 04-2592

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PIERRE DAWSON and ALFONZO INGRAM,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 02 CR 688

Elaine E. Bucklo, *Judge*.

ORDER

On *Paladino* remand, the judge stated simply: "The issue before me is whether I would have imposed the same sentences on these defendants if I had known the Sentencing guidelines were advisory. In this case I would have imposed the same sentences." The sentences were guideline sentences and such sentences are, as we held in *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005), presumptively reasonable under the new regime of the *Booker* case. The defendants in the present case do not

contend that the judge refused to consider or address any arguments they may have made for why the guidelines sentences imposed on them were unreasonable. Their only contention is that Mykytiuk is inconsistent with *Booker* and should be overruled. It is not inconsistent, and we shall not overrule it. The judgment is

AFFIRMED.

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 04-2557, 04-2592

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PIERRE DAWSON AND ALPHONSO INGRAM,

Defendants-Appellants.

Petition to Rehear Appeals from the
United States District Court for the
Northern District of Illinois, Eastern Division.
No. 02 CR 688 – **Elaine E. Bucklo**, *Judge.*

SUBMITTED DECEMBER 7, 2005 –
DECIDED JANUARY 17, 2006

Before CUDAHY, POSNER, and WILLIAMS, *Circuit Judges.*

POSNER, *Circuit Judge*. The government has moved for rehearing, complaining about the following passage in our opinion of September 28 and more particularly about the sentence in that passage that we have italicized:

> In suppression hearings in two previous cases, involving other defendants, the trial judges had disbelieved testimony by three government agents who also testified for the prosecution in our case. Defense counsel in our case

> wanted to use those judges' rulings to impeach the three witnesses' testimony. The judge refused on the basis of Rule 608(b) of the Federal Rules of Evidence, which provides that "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence." *Our defendants were not proposing to use extrinsic evidence, however, but merely to ask each witness whether a judge had disbelieved him or her in a previous case.*

United States v. Dawson, 425 F.3d 389, 396 (7th Cir. 2005). We went on to say that the error was harmless, and to affirm the conviction. But the government is concerned about the possible stare decisis effect of the passage and wants us to delete or modify it. Although deletion would provide no succor for the defendants, their lawyers have helpfully responded to the government's petition, and so we have had the benefit of an adversary presentation of the issue.

The government bases its argument on two items to which it did not refer in its appeal brief. One is a statement in the committee note accompanying amendments to Rule 608(b) made in 2003; the statement in its entirety is: "See also Stephen A. Saltzburg, Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence, 7 Crim. Just. 28, 31 (Winter 1993) ('counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act')." The second item is a footnote in *United States v. Davis,* 183 F.3d 231, 257 n. 12 (3d Cir.), as amended by 197 F.3d 662 (1999),

which, citing the Saltzburg article, states that the government "may [on cross-examination] question Davis [a defense witness] about lying to an Internal Affairs officer about ripping up an individual's subway pass[, but] if he denies that such events took place, . . . the government cannot put before the jury evidence that he was suspended or deemed a liar by Internal Affairs." See also *United States v. Whitmore,* 384 F.3d 836 (D.C. Cir. 2004) (per curiam), which appears to approve of the statement in *Davis.*

The passage in the committee note is not keyed to any change in the text of Rule 608(b) made by the 2003 amendments; in effect it is post-enactment legislative history – and not by a legislature, either; it is a statement by a committee of the Judicial Conference of the United States, i.e., a committee of judges. Nevertheless it is entitled to our respectful consideration. *Tome v. United States,* 513 U.S. 150, 160 (1995); Edward J. Imwinkelried, "Moving Beyond 'Top Down' Grand Theories of Statutory Construction: A 'Bottom Up' Interpretive Approach to the Federal Rules of Evidence," 75 *Ore. L.Rev.* 389, 394-95, 411-12 (1996). Even Justice Scalia, no fan of legislative history, agrees. *Tome v. United States, supra,* 513 U.S. at 167-68 (concurring opinion). The note itself, however, is to a rule concerning extrinsic evidence; the reference to questions of a witness appears only in the quotation from Professor Saltzburg's article. The weight properly given to such a reference is obscure.

Davis and *Whitmore* do not dispel the obscurity. They do not distinguish clearly between presenting extrinsic evidence that the witness was found not credible and, in a paraphrase of Saltzburg's statement, "inject[ing] the views of a third person into the case to contradict the witness"

merely by asking the witness about those views. *United States v. Davis, supra,* 183 F.3d at 257 n. 12. The passage we quoted earlier from *Davis* was unexceptionable in distinguishing between questioning a witness and presenting extrinsic evidence to contradict his answer; all that makes the case *seem* to bear on the issue before us is the court's reference to Saltzburg.

In *Davis,* moreover, the third person was not a judge; and while one of the third persons in *Whitmore* was, the per curiam opinion does not bother to mention the fact. The distinction may be important. Rule 609 allows convictions to be used to impeach credibility, suggesting that findings by judges or juries are entitled to more weight than what any old third party might happen to think about a witness's credibility. The quotation from Saltzburg's article likewise refers to "a third person's opinion" without attempting to distinguish among third persons. It is possible that Saltzburg, and the committee, rather than interpreting Rule 608(b) were merely offering cautionary advice to district judges regarding the exercise of discretion in the control of cross-examination; more on this later.

Rule 608(b) begins: "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness. . . ." Clearly that would have allowed the judge to permit the defendants' lawyer in this case to ask the witnesses whether they had lied in two previous suppression hearings. And there is nothing to suggest that the "inquiry" could not have extended to asking the witness whether a judge, say, had ever found him not to be a credible witness. After referring to "specific instances of

the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness," that may be inquired into on cross-examination, Rule 608(b) adds that: such character "may not be proved by extrinsic evidence." There would have been a problem in this case had the defendants' lawyer asked "has any federal judge ever found that you lied on the stand?" and when the witness answered "no" the lawyer sought to have the judge's finding placed in evidence. *That* would be "extrinsic evidence" and would be barred by Rule 608(b) if the evidence were being used to undermine the witness's "character for truthfulness." (It could have uses that did not concern "character for truthfulness" and were therefore outside Rule 608(b).)

This is not to suggest that every question a lawyer might want to ask about a third party's opinion of the credibility of a witness would be proper cross-examination. It is to suggest only that such questions are outside the scope of Rule 608(b). The trial judge has a responsibility not to allow cross-examination to get out of hand, confuse the jury, and prolong the trial unnecessarily. It would be one thing to ask a witness whether a judge or jury had disbelieved his testimony in the past if a pattern of dishonest testimony by the witness could be shown, and quite another to ask such a question when the witness had testified frequently and been disbelieved in only one case or where it was unclear whether and why the witness's testimony had been rejected. It would be within the district judge's discretion to permit the question in the first case and to forbid it in the second. Where on the spectrum the interrogation that the defendants' lawyers wanted to conduct in this case fell is unclear from the

record, but also unimportant, since if there was error in refusing to permit the interrogation it was harmless.

The important point is that the decision whether to allow a witness to be cross-examined about a judicial determination finding him not to be credible is confided to the discretion of the trial judge; it is not barred by Rule 608(b), which, to repeat, is a rule about presenting extrinsic evidence, not about asking questions.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court,
N.D. Illinois, Eastern Division.
UNITED STATES OF AMERICA, Plaintiff,
v.
Pierre DAWSON and Alfonzo Ingram, Defendants.
No. 02 CR 688.
May 26, 2004.

Matthew Joseph Madden, Federal Defender Program, Chicago, IL, Douglas D. Mulder, Douglas D. Mulder PSC, Dallas, TX, for Defendants Pierre Dawson and Alfonzo Ingram. Thomas Anthony Durkin, Jodi Lyn Garvey, Durkin & Roberts, Chicago, IL, for Defendant Pierre Dawson. Imani Chiphe, Federal Defender Program, Donna Ann Hickstein-Foley, Foley and Foley, Curtis Glover, Susan M. Pavlow, Law Offices of Susan M. Pavlow, Steven Jay Weinberg, Attorney, Chicago, IL, for Defendant Alfonzo Ingram. George Jackson, III, Barry A. Miller, U.S. Attorneys, United States Attorney's Office, Chicago, IL, for Plaintiff.

MEMORANDUM OPINION AND ORDER

BUCKLO, J.

On February 4, 2004, defendant Alonzo Ingram was convicted on one count of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine. Co-defendant Pierre Dawson was convicted on that count as well as one count of attempt to distribute in excess of five kilograms of cocaine. Both defendants have filed separate motions for judgment of acquittal and for a new trial. Mr. Ingram's motion for judgment of acquittal is DENIED. Denial of a judgment of acquittal is appropriate unless the evidence is insufficient to sustain a conviction. FED. R.CRIM. P. 29(a). In making that determination, I review

the sufficiency of the evidence in the light most favorable to the government and reverse "only if the record is devoid of evidence from which the jury could reach a finding of guilt." *United States v. Taylor*, 226 F.3d 593, 596 (7 Cir.2000). Mr. Ingram argues that his acquittal on Count Two, attempt to distribute, calls into question his conviction on Count One, conspiracy to distribute. It does not. Acquittal on a possession count does not render insufficient the evidence in support of a conspiracy conviction. *United States v. Billops*, 43 F.3d 281, 285 (7 Cir.1994). The evidence presented at trial in support of Ingram's involvement in the conspiracy was far more than adequate to justify the jury's decision.

Mr. Dawson's motion for judgment of acquittal is DENIED. The motion does not present an argument that the evidence was insufficient to support the verdict; it posits, instead, that evidence was wrongly admitted, leading to his conviction. This argument is properly addressed by the motion for a new trial. Mr. Ingram's and Mr. Dawson's motions for a new trial are DENIED. A district court may grant a new trial on the defendant's motion "if required in the interests of justice" because the verdict goes against the weight of the evidence. FED. R.CRIM. P. 33; *United States v. Washington*, 184 F.3d 653, 657 (7 Cir.1999). Such motions are disfavored and should only be granted in the most extreme cases. *United States v. Linwood*, 142 F.3d 418, 422 (& th Cir.1998). As the defendants duplicate some arguments, and in any case adopt one another's motions, I will analyze the motions together.

None of the alleged errors complained of merits a new trial; the evidence against both defendants was damning.

Some paragraphs essentially restate the motion for acquittal, discussed above. Defendants argue that the jurors were falsely instructed that an individual determination as to each defendant is "possible," while the correct instruction would have been that an individual determination is necessary. This was a correct answer to the jurors' question and could not reasonably have led the jurors to believe that they had to convict both Mr. Dawson and Mr. Ingram of conspiracy. Defendants argue that the tapes of the defendants' conversations were not properly admitted because they were unauthenticated and incomplete duplicates. The testimony of the government's confidential informant established that the tapes were a true and accurate recording of the conversation; this is sufficient. *United States v. Carrasco*, 887 F.2d 794, 803 (7 Cir.1989). Defendants argue that I erred in denying the motion to strike the testimony of Oscar Diaz because he testified that he did not know whether he would be prosecuted for his offenses and because of his "contingent fee" arrangement with the government. Mr. Diaz' agreement with the government provided that he would not be prosecuted as long as he testified truthfully; therefore, during his testimony, the deal was not yet complete, and Mr. Diaz' answer was accurate. Defendants cite no authority for the proposition that contingent reward arrangements with cooperating witnesses are a miscarriage of justice. The Seventh Circuit has voiced some concern about the practice, but has refused to overturn convictions based on contingent-fee witness testimony. *United States v. Estrada*, 256 F.3d 466, 471-72 (7 Cir.2001). Defendants argue that the trial was rendered unfair by the testimony of Rose Aubrey, who gave evidence of prior drug transactions engaged in by the defendants. Ms. Aubrey's testimony was appropriate under Rule 404(b). Defendants argue that the presence of only

three African-Americans in the venire violated the defendants' right to a jury of their peers. However, there is no requirement that a venire or jury reflect community makeup; as long as the initial list of potential jurors included a cross-section of the community and the selection process was fair, a venire or jury with few or no minority members does not provide a basis for any challenge. *United States v. Phillips*, 239 F.3d 829, 841 (7 Cir.2001). Here, defendants make no allegation that anything other than chance determined which potential jurors were part of the venire. Defendants argue next that the defendants were unfairly prejudiced by the introduction of evidence regarding attorney Doug Mulder, but they offer no explanation why this evidence was prejudicial. Defendants argue that the defendants were denied their Sixth Amendment right to cross examine witnesses because of a number of rulings I made at trial. Defendants do not explain why those rulings were incorrect, nor why, if they were incorrect, they justify a new trial. Defendants state without any explanation or argument that I erred in denying the defendants' requested jury instructions, pretrial motions, and oral motions and objections. These cursory arguments do not merit analysis. "A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim . . . [e]specially not when the brief presents a passel of other arguments." *United States v. Dunkel*, 927 F.2d 955, 956 (7 Cir.1991).

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 9, 2006

Before

Hon. Richard D. Cudahy, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

Nos. 04-2557, 04-2592

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PIERRE DAWSON and ALFONZO INGRAM,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 02 CR 688

Elaine E. Bucklo, *Judge*.

ORDER

On March 31, 2006, both of the defendants-appellants filed separate petitions for rehearing with suggestions for rehearing *en banc*. A majority of the panel has voted to deny the petitions, and none of the active judges has requested a vote on the petitions for rehearing en banc.* The petitions are therefore DENIED.

---

* Circuit Judge Ann Claire Williams voted to grant the petitions for rehearing with suggestions for rehearing *en banc*.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 2002 CR 688
v.	)	Chicago, Illinois
	)	
PIERRE DAWSON, and	)	January 27, 2004
ALFONSO INGRAM,	)	10:15 a.m.
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS – TRIAL
BEFORE THE HONORABLE ELAINE E. BUCKLO
and a jury

APPEARANCES:

For the Plaintiff: MR. GEORGE JACKSON III
MR. PATRICK C. POPE
ASSISTANT UNITED STATES ATTORNEY
219 South Dearborn Street, 5th floor
Chicago, Illinois 60604
(312) 886-7645
(312) 353-1980

For the Defendants: MR. THOMAS A. DURKIN
MS. JODI L. GARVEY
DURKIN & ROBERTS
53 West Jackson Boulevard, Suite 615
Chicago, Illinois 60604
(312) 922-8980

MS. SUSAN M. PAVLOW
MR. STEVEN J. WEINBERG
53 West Jackson Boulevard, Suite 1460
Chicago, Illinois 60604
(312) 322-0097

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PREPARED BY COMPUTER

MICHAEL P. SNYDER
Official Reporter
United States District Court
219 South Dearborn Street, Room 1902
Chicago, Illinois 60604
Telephone (312) 435-5563

[237] (Proceedings in open court. Jury out.)

THE COURT: Okay, good morning.

MR. JACKSON: Good morning, Your Honor.

THE COURT: I think we are waiting on one juror.

I did look at that case. I think if I – it's sort of hard to read the Seventh Circuit here, but my guess is if I sent it, if I struck the testimony, they would send it back for a more complete record.

But I do have to say I think the government has taken quite a risk. I mean, one of these days, a panel up there is likely, it seems to me it might well say: Wait a minute. We warned you. Obviously you're still doing this and doing this, and we are going to – if the only way to get you to stop doing it is to throw one out, that they are going to throw one out.

It looks like it's fairly easily avoided. I mean, what they are really criticizing is that he's testifying. They are not even criticizing so much that it – well, I guess that is the nature of a contingent fee, that somebody isn't paid before testifying.

MR. POPE: Yes, Your Honor. I understand there is a statute that specifically authorizes payments from cooperators that lead to seizures, and obviously to the extent the Seventh Circuit has a problem with it, it's a problem with Congress authorizing the statue and the executive branch implementing a statute that has been authorized.

[238] THE COURT: Well, their problem is testimony at the time that something hasn't been paid.

MR. POPE: But the problem is that in a lot of these cases, there is no actual forfeiture yet, and certainly the government isn't in a position –

THE COURT: You said there was one in this one, so you could have paid him.

MR. POPE: I may have misspoke on that one yesterday. I'm still trying to figure that out, and I will have an answer by noon today.

But regardless, the normal situation, if it's not administratively forfeited and administrative procedures aren't followed, you are always going to be in that situation with that statute authorizing 25 percent, up to 25 percent of that at trial, because there is no way, obviously, the government is going to pay out 25 percent of the money before a trial is over because you don't know if you are going to have to give it back.

THE COURT: That probably wouldn't be there, would it?

MR. POPE: And to the extent that that's paid out, right, going and getting that back from the cooperator is probably not something that, a position we'd want to be in.

MR. DURKIN: None of that addresses the problem. The problem is not – I mean, Congress passes all kinds of stupid [239] laws and many unconstitutional laws. The issue is the integrity of the judicial process.

THE COURT: I mean, I think what they are doing is saying that they might find it so offensive that as a legal matter, it has to be whether, since they don't recognize outrageous government misconduct, and I don't know that I would think that this was that anyway, but it is a question, as I understand what they are saying, of is there such a danger that there can't be credible testimony that it really should not even be considered by the jury?

MR. POPE: And that's why you wire them up, that's why you conduct surveillance, and that's why you corroborate what the cooperator is saying in these situations.

THE COURT: Well, they did in the end say there is overwhelming evidence, but that's what they said, they said there is such overwhelming evidence anyway –

MR. POPE: Correct.

THE COURT: – that we are not going to say it should be thrown out. That's why I think they'd send it back and say, "Well, we don't know what the other evidence

is." But I don't think you know that for sure. At any rate, I would want to, I don't know.

MR. DURKIN: That it seems to me, Judge, that if nothing else, the position the government is taking here is sheer proof that these people will not stop unless somebody [240] stops them. They see no problem with this. They are essentially saying to you, "What's the problem here? Congress passed the statute."

They don't get it, and that's the problem.

The problem is exactly what the Seventh Circuit says, and it's exactly what you're concerned about, which is the inherent conflict with somebody testifying with an interest in the outcome in the case, such a substantial financial interest in the outcome of the case. I think you have it under supervisory powers, not necessarily under outrageous government conduct. But it just seems to me, and I don't, you know, maybe this isn't the case, but I don't know what is going to stop them.

I mean, let's presume for a second –

THE COURT: Well, all I did was give the government, say that I thought they were taking a chance when they do this, and –

MR. DURKIN: Put another zero on this case, Judge. Think about if the seizure had been $2 million. What would be at stake here?

MR. JACKSON: There is a cap of $240,000 maximum.

MR. DURKIN: All right.

MR. POPE: Judge, just in response to that, we are painfully aware of what we need to do to catch drug dealers like the defendants in this case, and it's a cliche we say all [241] the time in rebuttal, however you want to say it, you know, there are no swans in the sewers. You know, would I like to be able to parade a priest, a rabbi, and a nun up here to tell you what these guys did on a certain day? Absolutely. I mean, it's become a cliche, but that's the reality. It's the harsh reality of the work that the DEA agents do every day. They need to flip cooperators who are involved in the drug dealing themselves and go out and do it.

THE COURT: I do actually think that it probably is a question of credibility, and unless I would see that I thought something was so, that he was so obviously lying, I probably would leave it to the jury. But I am really talking about the Seventh Circuit. They seem really quite disturbed.

MR. POPE: If we get there, we'll deal with it I'm sure up there as well.

THE COURT: All right. Well, we'll continue at this point, but you have a right to make your record, and you might want to renew it at the close of his testimony.

MR. DURKIN: We will. Thank you.

MR. POPE: Thank you, Judge.

MR. JACKSON: Your Honor, with respect to the 404(b), we have gone back, and you did enter an order.

THE COURT: Yes, I looked at my order.

MR. JACKSON: You entered an order on May 20th of last year, and that's document No. 88 in the record.

(2)

No. 06-207

In the Supreme Court of the United States

ALFONZO INGRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL A. ROTKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether due process required the district court to exclude the testimony of a cooperating witness, where the government agreed to pay the witness a percentage of the proceeds from drug sales forfeited as a result of his cooperation.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Banks v. *Dretke*, 540 U.S. 668 (2004) 12
Brady v. *Maryland*, 373 U.S. 83 (1963) 12
Giglio v. *United States*, 405 U.S. 150 (1972) 12
Hoffa v. *United States*, 385 U.S. 293 (1966) 9, 11, 12
Napue v. *Illinois*, 360 U.S. 264 (1959) 12
On Lee v. *United States*, 343 U.S. 747 (1952) 12
United States v. *Booker*, 543 U.S. 220 (2005) 2, 8
United States v. *Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) 16
United States v. *Cresta*, 825 F.2d 538 (1st Cir. 1987), cert. denied, 486 U.S. 1042 (1988) 14, 17
United States v. *Crim*, 340 F.2d 989 (4th Cir. 1965) 16
United States v. *Dailey*, 759 F.2d 192 (1st Cir. 1985) ... 17
United States v. *Dennis*, 183 F.2d 201 (2d Cir. 1950) aff'd, 341 U.S. 494 (1951) 9
United States v. *Estrada*, 256 F.3d 466 (7th Cir. 2001) . 5, 6
United States v. *Fallon*, 776 F.2d 727 (7th Cir. 1985) ... 15

Cases—Continued: Page

United States v. *Gonzales*, 927 F.2d 139 (3d Cir. 1991) 13, 14
United States v. *Grimes*, 438 F.2d 391 (6th Cir.), cert. denied, 402 U.S. 989 (1971) 15
United States v. *Hodge*, 594 F.2d 1163 (7th Cir. 1979) 14, 15
United States v. *Kimble*, 719 F.2d 1253 (5th Cir. 1983), cert. denied, 464 U.S. 1073 (1984) 16
United States v. *Levenite*, 277 F.3d 454 (4th Cir. 2002) 9, 10, 12, 15
United States v. *Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978) 10, 15
United States v. *Paladino*, 401 F.3d 471 (7th Cir. 2005) 8
United States v. *Persico*, 832 F.2d 705 (2d Cir. 1987), cert. denied, 486 U.S. 1022 and 488 U.S. 982 (1988) 14, 15
United States v. *Rey*, 811 F.2d 1453 (11th Cir.), cert. denied, 484 U.S. 830 (1987) 14
United States v. *Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978) .. 10, 15
United States v. *Spector*, 793 F.2d 932 (8th Cir. 1986), cert. denied, 479 U.S. 1031 (1987) 16
United States v. *Valle-Ferrer*, 739 F.2d 545 (11th Cir. 1984) 15
United States v. *Waterman*, 732 F.2d 1527 (8th Cir. 1984), cert. denied, 471 U.S. 1065 (1985) 16
Williamson v. *United States*, 311 F.2d 441 (5th Cir. 1962), overruled by *United States* v. *Cervantes-Pacheco*, 826 F.3d 310 (5th Cir. 1987) 15, 16

Statutes, regulation and rule:

Page

18 U.S.C. 201(c)(2) 7
18 U.S.C. 1751(g) 11
18 U.S.C. 3056(c)(1)(D) 11
18 U.S.C. 3195 10
18 U.S.C. 3521(b) 10
19 U.S.C. 1619(a) 11
21 U.S.C. 841(a)(1) 2, 5
21 U.S.C. 846 ..... 2, 5
21 U.S.C. 886(a) 3, 10
26 U.S.C. 7623 11
28 U.S.C. 1821 ..... 7, 10
United States Sentencing Guidelines 5K1.1 10
Fed. R. Crim. P. 11(e) (2001) 10

In the Supreme Court of the United States

No. 06-207

ALFONZO INGRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 19-20) is not reported in the *Federal Reporter* but is reprinted in 170 Fed. Appx. 974. The opinion of the district court (Pet. App. 27-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2006. A petition for rehearing was denied on May 9, 2006 (Pet. App. 31). The petition for a writ of certiorari was filed on August 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois of conspiracy to attempt to possess cocaine, in

violation of 21 U.S.C. 846 and 841(a)(1). Pet. App. 1, 27. He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. Pet. App. 1. The court of appeals affirmed the conviction, but ordered a limited remand in light of *United States* v. *Booker*, 543 U.S. 220 (2005), allowing the district court to determine whether it would have imposed its original sentence if it had understood that the Sentencing Guidelines were advisory. Pet. App. 1-18. While the remand was pending, the United States filed a petition for rehearing, and the court of appeals entered a supplemental opinion. *Id.* at 21-26. On remand, the district court determined that it would have imposed the same sentence under an advisory Sentencing Guidelines regime. The court of appeals affirmed. *Id.* at 19-20.

1. In 1990, Oscar Diaz arrived in the United States illegally, and began trafficking in large quantities of cocaine, as well as heroin and marijuana. Tr. 168, 171-173. In 2001, Pierre Dawson, himself a large-scale cocaine dealer in Memphis, Tennessee, met Diaz and discussed making a significant purchase of cocaine. Tr. 185-188, 204. Diaz and Dawson initially could not agree on a mutually acceptable price, but in August 2001, Diaz sold Dawson 50 kilograms of cocaine at a price of $19,000 per kilogram. Tr. 202-203, 211-214. Between August 2001 and December 23, 2001, Diaz made approximately seven to nine additional sales of cocaine to Dawson, each of which involved at least 100 kilograms of cocaine. Tr. 219-220. In one deal involving 150 kilograms, Dawson personally delivered more than $2 million to Diaz in a hotel room in Memphis. Tr. 249-251. The drugs were then delivered to Memphis by an 18-wheel truck from Texas. Tr. 221-225.

As part of the last deal during that period, on December 23, 2001, petitioner met with Diaz and Dawson at a hotel in Memphis. Later that day, Diaz and the driver of the 18-wheel truck arrived at a warehouse where they met Dawson, petitioner, and two other men. They loaded 283 kilograms of cocaine into a car, and petitioner drove the vehicle away. Tr. 251-259.

2. In April 2002, Officer Jeff Marran of the drug task force in Palos Heights, Illinois, approached Diaz to gauge his interest in cooperating with the Drug Enforcement Administration (DEA) by providing information about drug dealers, making surreptitious recordings, and testifying in court. Tr. 267-269. Officer Marran informed Diaz that, in exchange for his cooperation, he could receive money for the information he provided, as well as a fee of up to 20% of any drug-related proceeds seized and forfeited by the government as a result of his cooperation. Tr. 456; Pet. App. 2. See 21 U.S.C. 886(a) (authorizing the attorney general "to pay any person, from funds appropriated for the Drug Enforcement Administration, for information concerning a violation of this subchapter, such sum or sums of money as he may deem appropriate"). Officer Marran also assured him that, if he continued cooperating and "telling the truth," he would not be prosecuted for his past drug dealing. Tr. 267. Diaz accepted Officer Marran's offer. Tr. 269.

At the time of his recruitment, Diaz had an application for United States citizenship pending. In his application, Diaz answered "no" to a question asking whether he had committed any crimes. Diaz later informed the lead case agent about his application, and acknowledged that he had misrepresented his criminal history. The DEA neither assisted Diaz in obtaining citizenship nor

attempted to block his application. Diaz eventually became a citizen in 2002. Pet. App. 2-3; Tr. 168, 170.

Diaz grossed more than $1 million dealing drugs. Tr. 185. Although he filed tax returns for 1999, 2000, and 2001, he failed to list his drug profits as income. Tr. 490-492. He also failed to pay $12,000 in income taxes for 2002, based not only on his drug profits but on money he received from the government pursuant to his agreement to assist the DEA. See Tr. 463-465, 489-490.

3. Between April 30, 2002, and July 12, 2002, Diaz participated in a series of conversations with Dawson, two of which also involved petitioner. Unbeknownst to petitioner and Dawson, Diaz possessed a device that enabled DEA Special Agents to hear and record his conversations. Tr. 270-287, 396.

On July 12, 2002, petitioner and Dawson twice met with Diaz. Tr. 395-398. At the first meeting, which took place at a Walgreens store in Chicago, Dawson and Diaz spoke together for approximately 2-3 minutes when petitioner arrived. Tr. 286, 397-401. Dawson asked whether Diaz remembered petitioner, and Diaz responded that he recalled petitioner from the hotel, as part of the 283-kilogram deal in December 2001. Tr. 401-402. At the second meeting, Diaz met Dawson and petitioner in Diaz's garage to complete a purchase. Tr. 410-411. Dawson and Diaz confirmed that the sale would involve 38 kilograms of cocaine, and Dawson began to count out money he had brought along in a suitcase. Tr. 412. When Diaz said that counting the money was unnecessary, petitioner replied, "I just want you to know it's all here." Tr. 416. Shortly thereafter, DEA agents entered the garage, arrested petitioner and Dawson, and seized $269,000 in intended proceeds from the sale. Tr. 181, 410-416.

4. On November 19, 2002, a federal grand jury in the Northern District of Illinois returned a two-count indictment charging petitioner and Dawson with conspiracy to possess with intent to distribute and to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. 846 and 841(a)(1) (Count 1), and attempt to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. 846 and 841(a)(1) (Count 2). Indictment 1-2. The case proceeded to trial and Diaz testified for the government, in part to authenticate the tapes of his recorded conversations with Dawson and petitioner. See Pet. App. 5.

Cognizant of the Seventh Circuit's "general position with regard to admission of testimony of an informant who has a contingent fee arrangement with the government," which is "to allow the jury to consider such an arrangement in its evaluation of the witness's credibility," *United States* v. *Estrada*, 256 F.3d 466, 471 (2001), the district court permitted defense counsel to cross-examine Diaz at length about the money he had received to date, the money he stood to receive, and the general terms of his arrangement with the DEA. See Pet. App. 16. Diaz admitted that he had agreed to exchange "money for information," and that he would be financially "compensated for the information that I provide to the government." Tr. 456-457. Specifically, he admitted that he could receive "up to 20 percent of the seizure," which in this case meant almost $54,000. Tr. 457, 487. Diaz further admitted that he had already received $113,000 for information and expenses, and that he failed to pay income taxes on those payments because he "spent all the money." Tr. 458-461, 465.

In its instructions to the jury, the district court called attention to the fact that Diaz "received certain

benefits from the government in connection with this case and others as a result of his cooperation with the government." Jury Instructions 17. The court admonished the jury to "give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care." *Ibid.*

The jury found petitioner guilty on Count 1, but acquitted him on Count 2. Pet. App. 27. It found Dawson guilty on both counts. *Ibid.* The district court denied both defendants' post-verdict motions for judgments of acquittal, concluding that "the evidence against both defendants was damning," and "far more than adequate to justify the jury's decision" to convict petitioner of conspiracy. *Id.* at 28. Petitioner also sought a new trial on the ground that the district court erred in admitting Diaz's trial testimony in light of his "contingent fee" arrangement with the government. In denying the motion, the district court found "no authority for the proposition that contingent reward arrangements with cooperating witnesses are a miscarriage of justice." *Id.* at 29. The court noted that the Seventh Circuit "has voiced some concern about the practice, but has refused to overturn convictions based on contingent-fee witness testimony." *Ibid.* (citing *Estrada*, 256 F.3d at 471-472).

5. The court of appeals affirmed petitioner's conviction. Pet. App. 1-11.

a. Writing for the panel majority, Judge Posner rejected petitioner's argument that the district court should have excluded Diaz's testimony because of the benefits he received in exchange for his cooperation.

First, the court of appeals disagreed with petitioner's characterization of Diaz's agreement as a "contingent fee for his testimony." Pet. App. 4-5. Federal law prohibits any person from "paying witnesses (other than

experts) for their testimony (beyond the tiny fees permitted [under 28 U.S.C. 1821])." Pet. App. 5-6 (citing 18 U.S.C. 201(c)(2)). Under Diaz's agreement, however, the 20% fee "was paid whether or not Diaz testified," and Diaz "usually earned the bounty without having to testify" because most criminal cases, including forfeiture cases, settle before trial. *Id.* at 5. The court of appeals therefore described the arrangement as a kind of "bounty," or "a reward for rendering a service that the offeror wants done." *Ibid.* Rather than a flat fee, the government simply chose to offer "a percentage of the money that the government recovered from the offenders," thereby "giv[ing] the bounty hunter an incentive to concentrate on the biggest prey." *Ibid.* Moreover, the court noted, even a violation of the statutory prohibition against paying a witness for testimony does not necessarily require exclusion of testimony. See *id.* at 6 ("Exclusion confers windfalls on the guilty."). Under these circumstances, "[a]n exclusionary rule would be not only costly but also gratuitous * * * because a jury should be competent to discount appropriately testimony given under a powerful inducement to lie." *Ibid.*

Second, the court of appeals declined to adopt a "*general* policy (whether enforced by exclusion or by some other means) against giving a witness inducements to testify." Pet. App. 7. In any dispute, the parties themselves have "an interest, pecuniary or otherwise, in the outcome," yet courts long ago abandoned "the old rule" that parties are not sufficiently "disinterested" and may not testify on their own behalf. *Ibid.* The court noted that testimony by cooperating witnesses in drug prosecutions "is frequently indispensable," and that Diaz's testimony in particular "was amply corroborated, and not only by the recordings." *Ibid.* The court

of appeals also expressed concern about its institutional competence to second-guess the government's choice of inducements in the exercise of its prosecutorial discretion to combat drug trafficking. *Id.* at 8. Instead, the court reiterated that its objective is "to make sure that grossly unreliable evidence is not used to convict a defendant," and that it can accomplish that objective "by requiring (in effect) that the inducements be disclosed to the jury, which can use its common sense to screen out evidence that it finds to be wholly unreliable because of the inducements that the witness received." *Ibid.*

b. Judge Williams dissented. Pet. App. 12-18. In her view, Diaz's agreement with the government left him "financially motivated in the conviction of the defendants" and therefore violated petitioner's right to a fair trial. *Id.* at 12. Although she acknowledged that the government can offer a range of incentives, including immunity or reduced sentences, in exchange for truthful testimony, she concluded that the opportunities for abuse inherent in Diaz's agreement, whether characterized as a contingent fee or a bounty, "renders any percentage of moneys paid to a witness improper." *Id.* at 17-18.[1]

---

[1] Because the sentencing in these cases occurred before *Booker*, *supra*, the court of appeals, following its precedent, see *United States* v. *Paladino*, 401 F.3d 471, 483-484 (7th Cir. 2005), ordered a limited remand to allow the district court to determine whether it would have imposed its original sentence if it had understood that the Sentencing Guidelines were advisory. Pet. App. 11. During the pendency of the remand, the government filed a petition for panel rehearing, seeking clarification of a portion of the decision relating to a separate evidentiary issue resolved on appeal. On January 17, 2006, the court of appeals issued a decision addressing the government's petition. *Id.* at 21-26. Thereafter, the district court entered an order stating that it "would have imposed the same sentences" if it had known that the

c. On March 31, 2006, both petitioner and Dawson petitioned the court of appeals for rehearing with suggestions for rehearing en banc. Judge Williams voted to grant the petitions, but the panel majority voted to deny them. No other judge on the Seventh Circuit requested a vote on the petitions for rehearing en banc. Pet. App. 31 & n.*.

ARGUMENT

Petitioner contends (Pet. 7-13) that Diaz's testimony violated his constitutional right to a fair trial because Diaz's compensation agreement with the government created an intolerable risk of perjury. Every court of appeals to consider that claim ultimately has rejected it. Petitioner has identified no conflict between the decision below and any decision of this Court or another court of appeals. Further review is not warranted.

1. In *Hoffa* v. *United States*, 385 U.S. 293 (1966), this Court recognized that our criminal justice system "ha[s] countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly." *Id.* at 311 (quoting *United States* v. *Dennis*, 183 F.2d 201, 224 (2d Cir. 1950) (L. Hand, J.), aff'd, 341 U.S. 494 (1951)). The individuals best qualified to testify about criminal activity "are routinely either in conspiracy with the defendants or at risk of harm because they bore witness to criminal conduct." *United States* v. *Levenite*, 277 F.3d 454, 461 (4th Cir. 2002). Encouraging such witnesses to testify presents serious difficulties

---

Sentencing Guidelines were advisory, and the court of appeals affirmed the sentences on March 17, 2006. *Id.* at 19-20.

for law enforcement officials, as "few would engage in a dangerous enterprise of this nature without assurance of substantial remuneration." *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1338 n.19 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978).

Prosecutors therefore induce witnesses to cooperate by offering two kinds of incentive. First, they offer leniency. "[I]t has long been recognized that grants of immunity, plea agreements, and sentencing leniency are appropriate tools for use in the criminal justice system," as the Federal Rules of Criminal Procedure explicitly recognize. *Levenite*, 277 F.3d at 461-462 (citing Fed. R. Crim. P. 11(e) (2001)). The federal Sentencing Guidelines, for example, expressly contemplate a downward departure for criminal defendants who "provide[] substantial assistance in the investigation or prosecution of another person who has committed an offense." Sentencing Guidelines § 5K1.1.

Second, in some cases, they offer money. Federal law grants law enforcement officials broad discretion to compensate cooperating witnesses for information concerning criminal offenses. Some statutes authorize the payment of minor expenses, see 28 U.S.C. 1821, while others authorize the payment of major expenses and costs, see 18 U.S.C. 3521(b) (authorizing the payment of expenses for witnesses under relocation and protection statute); 18 U.S.C. 3195 (authorizing payment of all "fees and costs of every nature" involving extradition). Still others expressly authorize the payment of cash rewards to cooperating witnesses. See, *e.g.*, 21 U.S.C. 886(a) (authorizing the Attorney General to pay "any person," for information concerning violations of federal drug laws, "such sum or sums of money as he may deem appropriate, without reference to any moieties or re-

wards to which such person may otherwise be entitled by law").[2]

This Court has never questioned the admissibility of informants' testimony based on such incentives. In *Hoffa*, federal officials told Edward Partin, a Teamsters official on bail for state criminal charges and under a federal indictment, that Teamsters president Jimmy Hoffa might attempt to tamper with the jury at his upcoming trial in Nashville, Tennessee. 385 U.S. at 298. They encouraged Partin to "be on the lookout" and to "report to the federal authorities any evidence of wrongdoing that he discovered." *Ibid.* Partin agreed, and eventually testified against Hoffa, giving a first-hand account of the union leader's attempts to bribe the jury at his Nashville trial. *Id.* at 296 & n.3. Thereafter, "Partin's wife received four monthly installment payments of $300 from government funds, and the state and federal charges against Partin were either dropped or not actively pursued." *Id.* at 298.

On appeal, Hoffa argued that the admission of Partin's testimony rendered his trial fundamentally unfair and violated due process because "the risk that Partin's testimony might be perjurious was very high." 385 U.S. at 311. This Court acknowledged that "Partin, perhaps even more than most informers, may have had motives to lie." *Ibid.* Nonetheless, "it does not follow

---

[2] See also 18 U.S.C. 1751(g) (authorizing payments for "information and services" concerning violations of statute prohibiting the assassination of the President); 18 U.S.C. 3056(c)(1)(D) (authorizing Secret Service to pay "rewards for services and information" assisting the Secret Service in its law enforcement efforts); 19 U.S.C. 1619(a) (authorizing rewards for "information" about violations of custom laws); 26 U.S.C. 7623 (authorizing payments deemed necessary to detect and prosecute tax offenders).

that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible." *Ibid.* Emphasizing that "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury," this Court found the procedural safeguards at trial adequate, and upheld the conviction. *Id.* at 311-312.

Since *Hoffa*, this Court has continued to address the "'serious questions of credibility' informers pose" by ensuring that various procedural safeguards allow criminal defendants to vigorously challenge the testimony of cooperating witnesses. See *Banks* v. *Dretke*, 540 U.S. 668, 701 (2004) (quoting *On Lee* v. *United States*, 343 U.S. 747, 757 (1952)). First, this Court has held that due process requires full disclosure of the terms of any agreement with a cooperating witness to the defendant. See *Giglio* v. *United States*, 405 U.S. 150 (1972); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Second, defendants must enjoy "broad latitude to probe [informants'] credibility by cross-examination." *Banks*, 540 U.S. at 702 (quoting *On Lee*, 343 U.S. at 757). Third, this Court "ha[s] counseled submission of the credibility issue to the jury 'with careful instructions.'" *Ibid.* (quoting *On Lee*, 343 U.S. at 757). Fourth, the government may never knowingly sponsor or suborn perjury. *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). In evaluating challenges to the testimony of cooperating witnesses, lower courts have also considered the availability of evidence to corroborate the witness's testimony by "independent means." *Levenite*, 277 F.3d at 462.

In this case, all of those procedural safeguards were honored. Before trial, the prosecution fully disclosed

the nature of Diaz's agreement to petitioner, including the fact that Diaz could receive 20% of any amount recovered in forfeiture. See Tr. 456-457. Petitioner's attorney vigorously cross-examined Diaz about the agreement at trial, forcing him to admit to the jury that he stood to make almost $54,000, depending on the outcome. Tr. 457, 487. The district court instructed the jury to consider Diaz's testimony with "caution and great care" because of his deal with prosecutors. Jury Instructions 17. Nothing suggests that the government suborned or supported perjury. To the contrary, Diaz testified in large part to authenticate tape recordings of his conversations with petitioner and Dawson, Pet. App. 3, which greatly enhance the reliability of his testimony. As the court of appeals recognized, "Diaz's testimony * * * was amply corroborated, and not only by the recordings." *Id.* at 7. These safeguards gave the jury ample opportunity to assess the veracity and credibility of Diaz's testimony. Admission of his testimony did not violate petitioner's right to a fair trial.

2. Petitioner attempts to distinguish this case from "ordinary" informant cases (Pet. 3, 8-9) by noting that Diaz stood to gain a percentage of the amount forfeited, which depended in part on the outcome of the trial. No court of appeals embraces petitioner's argument, and several have explicitly rejected it. In *United States* v. *Gonzales*, 927 F.2d 139, 141 (3d Cir. 1991), the government promised a cooperating witness "a reward of up to 25% of the value of any forfeiture" obtained as a result of a reverse-sting drug operation. The Third Circuit rejected a due process challenge to admission of the witness's testimony at trial, finding itself "at a loss to understand what the government did that was outrageous." *Id.* at 144. It acknowledged that, although his

payment was not formally contingent on conviction, the witness "did have an interest in the result of this case" because of the relationship between the trial and the underlying forfeiture proceedings. *Ibid.* It nonetheless held that "[t]he method of payment is properly a matter for the jury to consider in weighing the credibility of the informant," and that the government's use of the witness at trial "did not create a due process problem." *Id.* at 144-145 (quoting *United States* v. *Hodge*, 594 F.2d 1163, 1167 (7th Cir. 1979)).

The First Circuit considered virtually identical facts in *United States* v. *Cresta*, 825 F.2d 538, 545 & n.3 (1987), cert. denied, 486 U.S. 1042 (1988), where a cooperating witness had received $53,000 in payments from the DEA, and "he expected to receive a potential maximum of $50,000 from the sale of [an ocean freighter], which was seized on the strength of information he provided" and was subject to forfeiture. The court found that the witness's testimony did not violate the defendant's right to a fair trial in light of "[t]he extent of the corroboration of [the witness's] testimony, plus the fact that the jury was fully informed of the nature of the agreement, the thorough cross-examination about the agreement, and the specific instructions admonishing the jury to weigh the accomplice's testimony with care." *Id.* at 546-547.

Other courts of appeals overwhelmingly have reached the same conclusion. See *United States* v. *Rey*, 811 F.2d 1453, 1456-1457 (11th Cir.) (declining to adopt a rule that, "absent justification or explanation, payment of an informer contingent upon obtaining the conviction of a specific person in itself violates due process"), cert. denied, 484 U.S. 830 (1987); *United States* v. *Persico*, 832 F.2d 705, 716-717 (2d Cir. 1987) ("The overwhelming

majority of courts, in assessing contingent fee arrangements with informants, have permitted the informant's testimony to be introduced at trial and have deemed the method of payment 'a matter for the jury to consider in weighing the credibility of the informant.'") (quoting *Hodge*, 594 F.2d at 1167), cert. denied, 486 U.S. 1022 and 488 U.S. 982 (1988); *United States* v. *Fallon*, 776 F.2d 727, 733 (7th Cir. 1985) ("Many cases have allowed the testimony of informers whose payment, whether it be leniency or cash, was contingent upon the beneficial results obtained by their testimony"); *United States* v. *Valle-Ferrer*, 739 F.2d 545, 547 (11th Cir. 1984) (per curiam) (rejecting a due process challenge where the government's key witness learned before trial that he would receive an additional $1000 per defendant convicted); *Reynoso-Ulloa*, 548 F.2d at 1338 & n.18 (declining to follow the rationale of *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962), overruled by *United States* v. *Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) (en banc), and upholding a conviction in spite of testimony by a cooperating witness who was "to be paid a specific amount for each pound of heroin seized"); *United States* v. *Grimes*, 438 F.2d 391, 395 (6th Cir.) (holding that contingent fee agreements with witnesses do not violate due process, even if the fee is to be paid "for the conviction of a specified individual"), cert. denied, 402 U.S. 989 (1971).[3]

---

[3] Courts of appeals also have upheld cooperating witness fees closely analogous to Diaz's agreement with the DEA. See *Levenite*, 277 F.3d at 463-464 (rejecting a due process challenge to testimony by a witness who was eligible for a reward of up to $100,000, at the discretion of the FBI, based on the extent of his cooperation "in attaining the objectives of the investigation"); *Perisco*, 832 F.2d at 716-717 (upholding a conviction where "the FBI would determine the amount of payment" to

Contrary to petitioner's suggestion (Pet. 8), the decision of the court of appeals does not conflict with the views of the Eighth Circuit. A panel of the Eighth Circuit briefly held that any offer of favorable treatment to a witness "contingent upon the success of the prosecution" violates due process, *United States* v. *Waterman*, 732 F.2d 1527, 1531 (1984), cert. denied, 471 U.S. 1065 (1985), but the court granted rehearing en banc and ultimately affirmed the conviction by an equally divided court, *id.* at 1533. The panel opinion has no precedential value. *United States* v. *Spector*, 793 F.2d 932, 936 (8th Cir. 1986), cert. denied, 479 U.S. 1031 (1987). Similarly, a divided panel of the Fifth Circuit once adopted a per se rule that testimony by informants operating under a "contingent fee agreement" with the government is inadmissible as a matter of due process, see *Williamson*, 311 F.2d at 444, but the rule eroded over time and the Fifth Circuit has since repudiated it, holding that "an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial" so long as procedural safeguards are in place, *Cervantes-Pacheco*, 826 F.2d at 315-316. As Judge Williams acknowledged in dissent, the decisions supporting petitioner's argument "have long since been ignored if not abrogated or outright overruled." Pet.

---

a cooperating witness based on "the 'overall quality' of any cases that had been developed"); *United States* v. *Kimble*, 719 F.2d 1253, 1255-1256 (5th Cir. 1983) (upholding a conviction based on the testimony of a cooperating witness's whose sentence reduction was contingent on "the adequacy of his cooperation"), cert. denied, 464 U.S. 1073 (1984); *United States* v. *Crim*, 340 F.2d 989, 990 (4th Cir. 1965) (per curiam) (rejecting a due process challenge where a testifying witness was to receive a level of compensation "later to be determined by responsible officials on the basis of an appraisal of the extent and quality of the [undercover] work").

App. 15. At present, only the First Circuit has expressed any constitutional doubts about witness fees dependent on a subsequent indictment or conviction, in dictum in a footnote twenty years ago. See *United States* v. *Dailey*, 759 F.2d 192, 201 n.9 (1st Cir. 1985) (suggesting that "such agreements skate very close to, if indeed they do not cross, the limits imposed by the due process clause"). That court's subsequent decision in *Cresta*, *supra*, makes clear, however, that it would uphold the admission of Diaz's testimony in this case.

The decision of the court of appeals does not implicate a circuit conflict, and is fully consistent with the decisions of this Court. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

OCTOBER 2006

No. 06-207

FILED
OCT 30 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ALFONZO INGRAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANTHONY PINELLI*
LAW OFFICES OF ANTHONY PINELLI
53 West Jackson Blvd., Suite 1460
Chicago, Illinois 60604
(312) 583-9270

SUSAN M. PAVLOW
LAW OFFICES OF SUSAN M. PAVLOW
53 West Jackson Blvd., Suite 1460
Chicago, Illinois 60604
(312) 322-0094

STEVEN J. WEINBERG
WEINBERG & RIZZI
53 West Jackson Blvd., Suite 1460
Chicago, Illinois 60604
(312) 322-0097

**Counsel of Record for Petitioner, Alfonzo Ingram*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ARGUMENT IN REPLY

The government's response is based upon a compilation of case law and statutes regarding witness compensation and fails to address payment specifically contingent upon criminal forfeiture. The Petitioner has no quarrel with the well settled practice of making contingent fee arrangements with informers. Courts have long held that the government may offer leniency, money, or as in this case, citizenship. When, as here, the reward is based upon the conviction of a defendant, it is tantamount to purchasing testimony and is a violation of due process.

The Petition points exclusively to a deal brokered by the government in which the liberty of an individual is placed at stake with a prize attached to it in the form of a success based contingency fee. In short, Diaz was promised 20% of money seized in reverse sting drug operations instigated by him. Diaz' payment would come directly from the seizure and forfeiture of the money, as outlined in the indictment. This record reflects that the government made a choice to include the forfeiture within the criminal proceedings. If a civil forfeiture had been instituted, and Diaz testified with the hope of a reward in a proceeding which did not involve liberty, but only the possession of money, there would be no constitutional violation. Diaz's reward required a criminal conviction in order to obtain the forfeiture, and thus the integrity of key evidence used to convict the petitioner was tainted beyond redemption by cross examination or instruction. *See*, 21 U.S.C. §853; *United States v. Sandini*, 816 F.2d 869, 873 (3rd Cir. 1987). *See, United States v. Palow*, 777 F.2d 52, 54 (1st Cir. 1985) ("The record shows that the convictions had nothing to do with the contingent agreement at issue. Accordingly, we see no reason here to exclude on due process grounds the informant's testimony").

The petitioner does not argue that his due process rights were violated by an agreement contingent upon the truth but rather contingent upon a verdict of guilty, a necessary prerequisite to Diaz's recovery of money. As noted in *United States v. Dailey*, 759 F.2d 192, 201 (1st Cir. 1985), "we note that at present we can think of no instance in which the government would be justified in making a promised benefit contingent upon the

return of an indictment or a guilty verdict." Much of the authority cited by the government deals with compensation related to the "overall quality of cases," not a verdict of guilty and thus, does not directly address the issue raised by Petitioner.

The government's reply rests on the long-accepted statements from *United States v. Hoffa*, 385 U.S. 293 (1966), which states the principle that no matter what agreement is made with an informant, a jury, informed of the circumstances and motivations, can properly weigh such evidence when measuring credibility. It has been more than forty years since that decision. It no longer shocks the conscience of any jury that an individual may be rewarded with liberty, citizenship, preferential treatment or any incentive for the purpose of procuring their testimony regarding knowledge of a criminal act. Prospective jurors are routinely inundated with the popular culture which has glamorized the practice of criminal law and which routinely displays in motion pictures and television series the ease with which prosecutors make deals for testimony. Thus, the effect of cross examination has been muted since that time. While cross examination may expose the motivation behind an informant's testimony, it does not provide an adequate due process safeguard against the purchase of testimony, and ultimately, against the corruption of the truth seeking process. Certainly the government would move *in limine* if it were to discover that an alibi witness had been promised a fee to provide exculpatory testimony to be paid only if a defendant were acquitted, even though the alibi witness provided truthful information.

A close examination of the cases cited by the government reveals more language condemning outcome based rewards than approving such methods. The government cites *United States v. Persico*, 832 F.2d 705 (2nd Cir. 1987), for the proposition that such agreements are properly placed before the jury. However, a reading of *Persico* reveals that the "'overall quality' of cases that were developed [] did not depend on the outcome of any prosecution." *Persico*, 832 F.2d at 717. Further, the arguments of cases cited by the government in *United States v. Fallon*,776 F.2d 727 (7th Cir. 1985), and *United States v. Valle-Ferrer*, 739 F.2d 545 (11th Cir. 1984) are unpersuasive. In *Fallon*, the informant stood

to receive leniency, a practice compatible with precedent. In *Valle-Ferrer*, the informant was promised, days before the trial was set to begin, $1,000 if the defendant was convicted. This scenario is distinguishable in several respects. As the Eleventh Circuit noted, the informant had already completed his investigative work before his learning of the fee. Here, Diaz was always working towards 20% from the beginning of his efforts setting up reverse-sting drug transactions where defendants would bring money instead of drugs. As a result, Diaz was motivated to create the case and enrich himself through a conviction. Further, there is a large difference between the $1,000 offered in *Valle-Ferrer*, and the $53,000 Diaz stood to gain here, in addition to the $113,000 he received as a salary, his citizenship, immunity, and other benefits.

The government's reliance on *United States v. Cresta*, 825 F.2d 538 (1st Cir. 1987), is misplaced. In *Cresta*, while the informant stood to receive a portion of the seized property once sold, it does not appear the property was forfeited criminally. A civil forfeiture proceeding is unrelated to a defendant's liberty. Here, there was a criminal forfeiture. A criminal forfeiture requires a conviction, making Diaz's fee contingent upon a conviction, not merely his "truthful testimony." This form of payment vests the witness in the outcome of the criminal proceeding.

In *United States v. Gonzales*, 927 F.2d 139 (3rd Cir. 1991) cited by the government, the opinion does not indicate the forfeiture proceeds, which were to go to the informant, were gained as a result of a criminal forfeiture. The informant, Vollmer, specifically stated that his "reward was not dependent on the defendant's conviction." *Gonzales*, 927 F.2d at 143. But he could not be paid unless there was a forfeiture which created a fund. Such a rule would not necessarily violate due process rights of a criminal defendant as the forfeiture proceeding would be conducted in a different forum, and therefore, the case does not provide the support urged by the government.

Most importantly, the government ignores the Seventh Circuit's concern as voiced in *United States v. Estrada*, 256 F.3d 466 (7th Cir. 2001), and echoed by the district court in this case.

Pet. 11. While the conviction was affirmed in *Estrada*, the Court discussed the contingency arrangement with the informant and noted that it had "unease" about the arrangement. Again, as with *Gonzales*, the opinion is unclear whether the forfeiture proceedings was civil or part of the underlying case. In discussing cases regarding payments of this nature, the Seventh Circuit specifically quoted from other circuit opinions which have contingent agreements based upon the conviction of particular persons and noted that in those cases, the bulk of payments made to informants were made before trial and were therefore not outcome determinative.

As pointed out in Petitioner's Writ of Certiorari, the district court struggled with this due to the lack of clear authority directing her regarding the admissibility of such evidence. Likewise, Judge Williams dissented, finding the practice analogous to purchasing testimony. The purchase of testimony, by either party in a litigation, is abhorrent and has never been condoned. This case provides the court the opportunity to create a bright line test regarding the admissibility of testimony motivated by a success based fee contingent upon a criminal conviction. The rule which Petitioner proposes does nothing to bar the government from instituting civil forfeiture proceedings which would allow them to seize assets using contingency rewarded witnesses without the risk of the loss of liberty based on perjured testimony, or to continue the long-standing practice of expending benefits such as leniency, cash, or even citizenship. But in basing the informant's 20% on the successful outcome of a criminal forfeiture, which in turn requires a finding of guilt to the underlying crime, the effect is to make payment dependent on the outcome of a criminal proceeding, or paying a witness for his testimony, a practice counter to our system of due process.

While the government handpicked a quote from Judge Williams' dissent finding that petitioner's argument "have long since been ignored if not abrogated or outright overruled," the next sentence, following a series of citations, states that, "[T]he specter of these values persists nonetheless." Pet. App. 15. Later, Judge Williams cautions the government to also "consider the canons of professional conduct, which forbid the

practice of predicating witness payment on case outcomes" and concludes that "any percentage of moneys paid to a witness [are] improper when such payment depends upon the conviction of another." Pet. App. 17-18.

The government treats this issue as if it were governed by well settled law. However, the government does not address the Seventh Circuit's discussion in *Estrada*, the issues raised in Judge Williams' dissent, or the language of the district court indicating that "I think the government has taken quite a risk . . . if the only way to get you to stop doing it is to throw one out, that they are going to throw one out." Pet. 11. It is apparent that this issue is not settled and there is significant support in the law for barring informant testimony in a criminal case, when the informant's reward depends on the outcome of a criminal forfeiture founded upon a verdict of guilty. The Petitioner was denied due process at his trial and this issue is ripe for review.

Respectfully submitted,

ANTHONY PINELLI*
LAW OFFICES OF ANTHONY PINELLI
53 West Jackson Blvd., Suite 1460
Chicago, Illinois 60604
(312) 583-9270

SUSAN M. PAVLOW
LAW OFFICES OF SUSAN M. PAVLOW
53 West Jackson Blvd., Suite 1460
Chicago, Illinois 60604
(312) 322-0094

STEVEN J. WEINBERG
WEINBERG & RIZZI
53 West Jackson Blvd., Suite 1460
Chicago, Illinois 60604
(312) 322-0097

**Counsel of Record for Petitioner, Alfonzo Ingram*